IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

FRIDAY, THE 14TH JULY 2006 / 23RD ASHADHA,1928

CRL. A. No. 282 of 1999()

CC.246/1996 of JUDL. MAGISTRATE OF FIRST CLASS COURT, ADIMALI

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APPELLANT:

V.K.GEMINI, S/O.KARUNAKARAN,
VARAKIL HOUSE,
SELLIAMPARA,
VELLATHOOVAL P.O.

BY ADV. SRI.C.J. JOY

RESPONDENTS:

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1. CHANDRAN, S/O. KESAVAN,
MARUTHOLIL HOUSE,
VELLATHOOVAL P.O.

2. STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR (SRI. K.J. GEORGE)

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 14 /07/ 2006, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.HEMA, J.

CRL. A. NO. 282 OF 1999-B

Dated this the 14th day of July, 2006

J U D G M E N T

Can the complainant (ie., the "payee" or the "holder in due course") in a prosecution for offence under section 138 of the Negotiable Instruments Act (the Act, for short) be presumed to be the "holder" of the cheque ? Can the presumption under section 139 of the Act be drawn in favour of the complainant, invariably in all such complaints treating him as the "holder" of the cheque? Can the mere admission of the handwriting and signature in the cheque lead to the presumption under section 139 of the Act that the cheque is received for the discharge of a debt or liability ? These are the main questions which arise for consideration in this appeal.

FACTS, BRIEFLY:

2. The appellant filed a complaint before Magistrate's Court, alleging offence under Section 138 of the Negotiable Instruments Act (`the Act', for short), against first respondent herein. The accused-first respondent allegedly borrowed a sum of Rs.60,000/- from complainant and issued a cheque, Ext.P1 for the discharge of the debt. The cheque, on presentation was dishonoured, due to insufficiency of funds. Notice was issued to accused, other legal formalities were complied with, and a complaint was

filed against first respondent. PWs. 1 to 3 were examined and Exts.P1 to P7 were marked, on the side of the complainant/appellant. The accused examined DWs. 1 to 3 and marked Exts.D1 and D2 on his side.

DEFENCE PLEA :

3. According to accused he had been mentally sick for the past 8 to 9 years prior to the alleged transaction. Because of the peculiarity of the disease, his mental condition was impaired. In such state of mind, he as in the habit of issuing cheques to various persons, without owing anything to them. He used to assume himself to be a very affluent person during such period. But, people used to return such cheques, understanding the peculiar and abnormal habit of the accused. Ex.P1 is one such cheques issued to complainant which was misused by the complaint to file the complaint. The accused actually did not owe any money to complainant and he did not issue any cheque for the discharge of any debt or other liability, as alleged.

4. On an analysis of the evidence, particularly, medical evidence adduced by accused, trial court found that prosecution failed to establish that Ext.P1 cheque was issued by the accused for the discharge of a debt and hence the accused was acquitted. According to learned counsel appearing for appellant, handwriting and signature in the cheque are admitted by the accused and hence the court is bound to draw the presumption under section 139 of the Act that the cheque was issued for the discharge of a debt or liability. The acquittal is therefore, illegal.

5. In the light of the above contention, the first question to be decided is whether the mere admission of the handwriting and signature in the cheque would lead to the presumption under section 139 of the Act that the cheque is received for the discharge of a debt or liability ? In my view, it will not. To support my view, a detailed analysis of section 139 of the Act is absolutely essential. Prior to that, a flash-reference to section 138 is also necessary.

6. A reading of section 138 of the Act reveals that one of the main ingredients to be proved in an offence under section 138 of the Act is that `THE CHEQUE IS DRAWN FOR THE DISCHARGE OF A DEBT OR OTHER LIABILITY'. (vide ***Kusum Ingots & Alloys Ltd. v. Pennar Peterson Securities Ltd.,* (2000) 2 SCC 745**). This ingredient constitutes two factors: i) the `DRAWING' of the cheque and ii) the specific `PURPOSE' for which the cheque is drawn. Both these factors have to be independently proved to attract the offence under section 138 of the Act. But, does the admission of handwriting and signature in the cheque prove both these factors?

DOES ADMISSION PROVE ?

7. The admission of the handwriting and signature of the accused in the cheque may prove one of the above factors ie., the cheque is "DRAWN" by him, provided the court is satisfied that the cheque was written and signed by the drawer voluntarily, and such drawing is not vitiated by any legal grounds. But, the mere proof of `DRAWING' of the

cheque will not further prove the relevant `PURPOSE' for which the cheque is drawn. This is because of the simple reason that a cheque can be drawn by a person for various purposes other than for the discharge a debt or other liability also. Therefore, the court cannot, on mere proof of execution of cheque, conclude that such execution was for the discharge of a debt or other liability, unless there is evidence to prove such fact or there is any presumption in law to presume such fact.

IS THERE ANY PRESUMPTION?

8. According to learned counsel for appellant there is a presumption under section 139 of the Act that the cheque which bears the admitted handwriting and signature of the accused is issued for the discharge of a debt or other liability. Section 139 reads as follows:

> **"S. 139. Presumption in favour of holder**.—It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability".

9. Even on a plain reading of section 139 of the Act, it cannot be said that the mere execution/drawing of the cheque (by admission or otherwise) will automatically lead to the presumption that the cheque is drawn for the discharge of a debt or other liability. On the other hand, it is clear from section 139 that to draw the presumption under the said section, certain basic factors referred to in the section are to be established. As held by the Supreme Court, the court must be satisfied of "the existence of facts which have to be present before the presumption can be drawn".

(vide ***Kali Ram v. State of H.P.,*** **(1973) 2 SCC 808** ***and also Hiten P. Dalal v.Brathindranath Banerjee*** **(2001) 6 SCC 16).**

THE IMPORTANT ELEMENT U/S 139:

10. Section 139 of the Act reveals that the first and foremost basic factor to be satisfied for drawing the presumption under section 139 of the Act is that the person in whose favour such presumption is drawn is the "HOLDER" of the cheque, as defined under the section. The title to section 139 itself shows that the presumption is in favour of the "holder" of the cheque. Is the complainant, a `HOLDER' ? Can the complainant in every prosecution for an offence under section 138 of the Act be treated as the "holder" of the cheque ? To answer this important question, firstly, Section 142 has to be looked into.

11. Section 142(excluding the irrelevant details for the purpose of answering the issue before me), reads as follows:

> **"section 142. Cognizance of offences.—** Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—
>
> (*a*) no court shall take cognizance of any offence punishable under Section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;
>
> (*b*) xxxx
>
> (*c*) xxxx"

12. It is clear from a reading of section 142 as well as from section 138 of the Act that in a prosecution for offence under section 138 of the Act,

the complainant has to be either the "payee" or the "holder in due course" of the cheque. But, the presumption under section 139 of the Act is available only in favour of the "holder" of the cheque. There is no such presumption in favour of either the "payee" or the "the holder in due course"under section 139 of the Act. So, it may apparently appear that the presumption under section 139, being in favour of the "holder" of the cheque, such presumption shall not be drawn in favour of the complainant, since he is only the "payee" or the "holder in due course". Can this view be confirmed? To affirm or deny, a deeper probe is necessary and it involves interpretation of certain provisions of the Act.

LEGISLATIVE OBJECT:

13. Before proceeding to interpret any provision or expression in an enactment, the legislative object of the statute has to be borne in mind. The court should take care to ensure that such object is not defeated. The interpretation, which is required in this case, is mainly of Sections 138, 142 and 139 of the Act. Those sections were introduced into the Act by adding a new chapter viz., Chapter XVII, as per `the Banking, Public Financial Institutions and Negotiable Instruments Law(Amendment) Act, 1988' (the Amendment Act). The said Act came into force with effect from 1-4-1989.

14. `The Statement of Objects and Reasons' given in the Amendment Act for inserting new Chapter XVII in the Act is as hereunder:

> "(*xi*) to enhance the acceptability of cheques in settlement of liabilities by making the drawer liable for penalties in case of bouncing of cheques due to insufficiency of funds in the accounts or

> for the reason that it exceeds the arrangements made by the drawer, WITH ADEQUATE SAFEGUARDS TO PREVENT HARASSMENT OF HONEST DRAWERS." (emphasis supplied)

15. By the introduction of Chapter XVII into the statute-book in 1989, certain LIMITED acts which, till then, constituted only civil liability are seen transformed into criminal liability. This was done with the main object of enhancing the acceptability of cheques in settlement of liabilities. But, while inserting Chapter XVII and making a drawer of the cheque liable for penalties in case of bouncing of cheques, the legislature also took care to ensure that a honest drawer is not subjected to any harassment. So, in `the Statement of Objects and Reasons' itself it is stated that the Amendment Act has provided for `**adequate safeguards in the act to prevent harassment of honest drawers'.**

GENERAL SAFEGUARDS-PRESUMPTION OF INNOCENCE:

16. The general safeguard for an accused in a criminal prosecution is presumption of innocence in his favour. Law intends to punish only the guilty, whose guilt is proved to the hilt. Therefore, an accused in a criminal case is presumed to be innocent, until the guilt is proved beyond reasonable doubt. The presumption of innocence is declared even as a human right by the Supreme Court. (vide ***Narendra Singh v. State of M.P.,*** **[(2004) 10 SCC 699]** *and* ***P.N. Krishna Lal v. Govt. of Kerala,*** **[1995 Supp (2) SCC 187]**. *T*he Criminal Justice System in this country is thus working well on the cardinal principle of presumption of innocence of the accused in a criminal case. This golden presumption or rule has guided the courts

across the country in any criminal prosecution.

17. Even in cases where an enactment provides for a presumption of guilt, the courts have to be cautious. A three-judges bench of the Supreme Court held in ***Kali Ram v. State of H.P.,*** **[(1973) 2 SCC 808]** held thus:

> "There are certain cases in which statutory presumptions arise regarding the guilt of the accused, but the burden even in those cases is upon the prosecution to prove the existence of facts which have to be present before the presumption can be drawn".

18. Thus, in cases where there is a statutory presumption regarding guilt of the accused also, prosecution is bound to prove the guilt beyond reasonable doubt, by establishing the facts necessary for drawing the presumption. I do not find any reason why this rule should be departed from, in cases involving offence under section 138 of the Act.

OFFENCE U/S 138 -- A LEGAL FICTION:

19. The offence under section 138 is not a natural crime. It is not a crime like hurt or murder. It is an offence created by a legal fiction in the statute. It is a civil liability transformed into a criminal liability, under restricted conditions by way of an amendment to the Act, which is brought into force only in 1989. Till then, the offending acts referred to in section 138 constituted only a pure civil liability. So, legitimately, the legislature thought it fit to provide for adequate safeguards in the Act to protect honest

drawers from unnecessary harassment, while introducing the relevant provisions relating to such offence into the statute book.

STRICT INTERPRETATION NEEDED:

20. In this background, I find that the penal provisions of the Act require a strict interpretation so that none shall be harassed or prosecuted baselessly. This is particularly so, since the legislature chimes the bell of caution in `The Statement of Objects and Reasons' to the Amendment Act itself that a honest drawer shall not be harassed. The bell is not a gimmick, it is a melody of a safeguard provided to protect the innocent who is likely to be harassed.

21. In ***Shri Ishar Alloy Steels Ltd. v. Jayaswals Neco Ltd*** **[*(2001) 3 SCC 609*]**, the Supreme Court held thus:

> "It has always to be kept in mind that Section 138 of the Act creates an offence and the law relating to the penal provisions has to be interpreted strictly so that no one can ingeniously or insidiously or guilefully or strategically be prosecuted". (emphasis supplied).

THE THREE EXPRESSIONS:

22. Keeping the above principles in my mind, I shall proceed further with the task of resolving the main legal issue in this case. Can the complainant (who is either the "payee", "holder in due course") in a prosecution for offence under section 138 of the Act be treated as the "holder" of the cheque ? The expressions, the "payee", "holder in due course" and "holder" of the cheque are defined under sections 7 to 9 of the Act. Section 7 of the Act defines "payee" thus:

> **Section 7 - "Payee"**—The person named in the instrument, to whom or to whose order the money is by the instrument directed to be paid, is called the "payee".

Section 8 of the Act defines the "holder" as follows:

> **Section 8 - "Holder"**.—The "holder" of a promissory note, bill of exchange or cheque means any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto. Where the note, bill or cheque is lost or destroyed, its holder is the person so entitled at the time of such loss or destruction".

The "holder in due course" is defined under section 9 of the Act is follows:

> "**section 9: Holder in due course**".—"Holder in due course" means any person who for consideration became the possessor of a promissory note, bill of exchange or cheque if payable to bearer,
>
> Or the payee or indorsee thereof, if payable to order, before the amount mentioned in it became payable and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title".

HOLDER NOT MERE POSSESSOR:

23. I shall first consider who a "holder" of the cheque is. The definition reveals, he is not a person who merely "holds" or "carries" the cheque, as it may apparently appear. The 'holder' is not the person who is in mere possession of the cheque. He is not the one who merely "produces" the cheque in court from his custody. He is not even the person who is only named in the cheque. A "holder" of the cheque has a definite meaning under the Act. Section 8 provides that a "holder" of the cheque is the

person who is `ENTITLED' in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto. (Where the cheque is lost or destroyed, its holder is the person so entitled at the time of such loss or destruction).

ENTITLEMENT, THE BEDROCK:

24. The bedrock of the definition of holder is "entitlement". Such entitlement is i) to the possession of the cheque and ii) to receive and recover the amount due thereon from the parties to the cheque. Strictly speaking, even the actual possession of the cheque may not be decisive under section 8. Even if a person is in possession of the cheque, if he does not have the entitlement as stated in the section, such person cannot be said to be a "holder". So also, even if a person is not in actual possession of the cheque, if he is `entitled' to be in possession of the cheque, he can still be brought under the definition of the "holder". It is not even the physical possession of the cheque, but the `ENTITLEMENT' to be in possession of the cheque which is relevant.

25. `Entitlement' denotes a legal right to have some thing or to do some thing. If the cheque has come to the hands of a person by illegal or dubious means, he will not be legally entitled to the possession thereof. Thus, even the possession of the cheque by a person will not suffice to treat a person as the "holder" of the cheque. The "holder" of the cheque must have the right to have the possession of the cheque, whether he is in actual possession of it or not.

ENTITLEMENT, 'IN HIS OWN NAME':

26. it is also relevant to note that the "holder's" entitlement to possession of the cheque and to the recovery or receipt of the amount etc., must be "IN HIS OWN NAME". That means, even if a person has certain right to possess the cheque and to receive or recover the amount etc., such mere right may not suffice to bring him within the sweep of section 8 of the Act, unless such entitlement is "in his own name" and not in any other person's name. That means any and every entitlement is not enough, but it must be entitlement in his own name.

27. The mere possession of a cheque by a person or even his entitlement to the possession thereof or even his right to receive or recover the amount will not satisfy the requirement under Section 8, unless such entitlement is IN HIS OWN NAME and not on behalf of another. For a person to claim to be a holder of the cheque, he must have the right "in his own name", to be in possession thereof and to receive or recover the amount due thereon from the parties thereto. (I shall cite an example later, which will clarify this position).

AMOUNT MUST BE 'DUE':

28. The next crucial aspect in the definition of `holder' in section 8 relates to the amount. What is referred to in section 8 is "amount DUE thereon". The relevant expression used in Section 8 is not the "amount STATED thereon" or merely the "amount `(--)' thereon". Significantly, the word "DUE" appears in between. "Due" indicates `owing' or `become liable

to'. So, the amount which the holder of the cheque is entitled in his own name to receive or recover must be, the amount which is "DUE" thereon from the parties to the cheque.

29. Thus, the holder's right must not be merely to receive or recover the amount stated or shown in the cheque but, such amount must be "DUE" thereon from the parties thereto. The parties to the cheque must be bound to pay the amount and the "holder" must be entitled in his own name to receive or recover the amount from them, as due thereon.

EXAMPLE - A:

30. In the light of the several peculiar expressions in the definition of `HOLDER' in section 8, I shall better cite an example: A cheque is drawn by `X' for his own purpose, ie., to meet his own requirement. He hands over the same to his servant, `Y' for encashing the same from the bank. ` He shows the name of `Y' in one of the cheques as `payee'. `X' does not owe any money to 'Y'. In this example, Y' is the `payee' as the `person named in the cheque to whom or to whose order the money is by the instrument directed to be paid'. (vide definition of "payee" under section 7 of the Act). But, he is not the `holder in due course', since he is not the person who for "consideration" has become possessor of the cheque.

31. `Y' is not the `holder' of the cheque also. He is not entitled "IN HIS OWN NAME" to possess the cheque. His entitlement to be in possession of the cheque is only `on behalf of' the drawer for the mere purpose of encashing the cheque. If he does not encash the cheque, he has no right

`in his own name' to keep the cheque in his possession any longer. He is bound to return the cheque to 'X'.

32. `Y' is also not entitled "IN HIS OWN NAME" to receive or recover the amount stated in the cheque from the drawer, who is one of the parties to the cheque, though he can receive or recover the same from the drawee-bank. 'Y's right to receive or recover the amount in the cheque is only as the 'payee', who is named in the cheque and to whom money is directed to be paid. He can only receive, recover or encash such amount from the bank as the payee. But, he is bound to pay it to the drawer. He cannot receive or recover such amount from the drawer as "due" thereon because no amount is due from `X' to `Y'. So, `Y', cannot claim to be the `holder' of the cheque, since he is not entitled to receive or recover the amount as `DUE', from the drawer who is one of the parties to the cheque.

33. But, later `Y' does not encash the cheque nor does he return the same to `X'. He acts in violation of the understanding between the parties. The drawer `X' therefore, requests the bank to stop payment. `Y' thereafter, presents the cheque to the bank. The cheque is dishonoured as unpaid and `Y' files a false complaint alleging offence under section 138. The court may take cognisance of the offence under section 138, because `Y' the complaint is filed by the `payee'. But, the complainant is not the "holder in due course". He cannot be treated as the `holder' of the cheque also, since he is not entitled in his own to the possession thereof and to receive or recover the amount due thereon from the parties thereto.

HOLDER IN DUE COURSE, IF HOLDER ?

34. The difference in the language used in section 8 and 9 itself is enough to show that "holder in due course" is not the same as the "holder". Still, I shall examine in more details, whether the " holder in due course" and the "holder" can be said to be one and the same. Referring to the definition of "holder in due course" in section 9 of the Act, the Supreme Court, in U. Ponnappa Moothan Sons v. Catholic Syrian Bank Ltd., (1991) 1 SCC 113, held: "The definition makes it clear that to be a 'holder in due course' a person must be a holder for consideration and the instrument must have been transferred to him before it becomes overdue and he must be a transferee in good faith and another important condition is that the transferee namely the person who for consideration became the possessor of the cheque should not have any reason to believe that there was any defect in the title of the transferor".

35. It is thus evident that the expression, "holder in due course" has a well-defined meaning. Going by the plain language of section 8 and 9 of the Act itself, it is abundantly clear that the expressions "holder" and "holder in due course" mean different. There are certain striking differences between the two. In the case of the "holder in due course", possession of the cheque is an essential factor whereas, in the case of the "holder" of the cheque, it may not be so. Unlike the definition of `holder in due course', the definition of `holder' refers only to `entitlement' to be in possession of the cheque and not to the actual possession. Even if the `holder' is not

in possession of the cheque, he can be said to be the "holder", if proves his `entitlement' to be in possession of the cheque etc.

36. Another distinction between the "holder' and "holder in due course" is in respect of "consideration". In the case of "holder in due course", he is a person who becomes possessor of the cheque for "consideration". But, the definition of the "holder" does not show that his entitlement to possession of cheque shall be for any "consideration". In fact, it is not specified in section 8 of the Act that the holder's entitlement to possession of cheque has anything to do with any "consideration". There are various other differences also. Since the language used in section 8 and 9 which defines "holder' and "holder in due course" itself materially differs, it cannot be presumed that "holder in due course" is the "holder" unless law permits it.

NO PRESUMPTION-HOLDER IN DUE COURSE IS HOLDER:

37. It is pertinent to note that there is no provision in the Act by which the "holder in due course" (who may be the complainant) can be presumed to be the "holder". There is however, a presumption under section 118(g) of the Act vice versa ie., a "holder" is a "holder in due course", under certain specified conditions. This itself is an indication that both the expressions "holder" and "holder in due course" do not mean the same. Otherwise, it was unnecessary to lay down a provision by which "holder" can be presumed to be the "holder in due course"..

38. Though there is a presumption under section 118(g) of the Act that a "holder" is a "holder in due course" under certain circumstances, there is no presumption in the reverse i.e., the "holder in due course" is the "holder". As the syllogism goes, `all crows are black, but all black things are not crows'. Thus, the court shall not draw any presumption in law that the complainant who may be the "holder in due course" is the "holder" in the absence of any evidence to prove that the complaint is a "holder" also.

EXAMPLE - B:

39. I shall cite another example to depict the distinction between the relevant expressions under discussion: A cheque is drawn by `A' in the name of `B' for a certain amount. The cheque is in the lawful possession of `C' who has certain rights over the same. As per the terms of a valid Will and testament, `C' gives to `D', the right to be in possession of the cheque`in his own name' and to receive or recover the amount due thereon, from the parties thereto.

40. The Will also reveals that the possession of the cheque by `D' is not for any `consideration'. 'D' also did not become possessor of the cheque for "consideration". So, going by the definitions, `D' is not the "holder in due course", since he is not even in possession of the cheque. He is also not the `payee' because, he is not named in the cheque. But, he is the "holder" of the cheque because, by virtue of the Will, he is entitled in his own name to be in possession thereof and to receive and recover the amount due thereon from the parties thereto.

41. Later, a decree is passed by the court against `D', prohibiting him from receiving or recovering the amount due thereon from the parties thereto. `D' ceases to be the "holder" of the cheque since, by virtue of the decree, he is not entitled to receive or recover the amount due thereon from the parties thereto. Thus, even if he becomes possessor of the cheque, he is neither the 'payee', 'holder' or 'holder in due course'.

42. I have cited just two examples in this judgment. These examples are not exhaustive. It is also clear from those two examples that a "payee" may not be a the "holder in due course". (A person in possession of a bearer-cheque may be a "holder in due course"). A "payee" may not be a "holder" also. In the same way, a 'holder' may not be a 'payee' or 'holder in due course'. There may be several other instances where the complainant, who may be the "payee" or the "holder in due course", may not be the "holder" of the cheque. There may also be cases where the complainant may be all the three i.e., the "payee", "holder" and "holder in due course". It depends on the facts and circumstances of each case. So, to decide whether a person is a "payee", "holder" or "holder in due course", there must be evidence and materials on record.

43. It must be borne in mind that cheques are issued in the course of various types of business transactions in which several complicated situations may arise. The court cannot visualise all such situations. Without forseeing all such instances, it may not be proper for this court to lay down any general proposition that the complainant who is a "payee" or "holder in

due course", as the case may be, is the "holder" of the cheque. They are indeed different as seen from the difference in the language used to define them. The courts shall not therefore proceed on any pre-conceived notion that all the three expressions mean the same or that they do not make much difference. Legislature will not use any particular word, without meaning anything at all.

LANGUAGE NOT USED IN VAIN:

44. The language in any enactment has very great significance, while interpreting the provision. The duty of the court must be to find out what the legislature intended, by carefully going by the plain language of the provisions, rather than effortlessly explaining away, that all the expressions would mean the same thing, and that the legislature did not intend any thing special. Such an exercise would do violence to the legislation because, legislature cannot be said to be wasting words aimlessly, picking up some words at random and using the same to satisfy its whims and fancies. A statute or a provision shall not be read with any pre-conceived notion that the words used therein may be superfluous or redundant, without intending much.

45. As held in ***Shin-Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.,*** **[(2005) 7 SCC 234]**, "it is a well-accepted principle of statutory interpretation that a court must make every effort to give effect to all words in a statute since Parliament cannot be held to have been wasting its words or saying something in vain". "In the interpretation of statutes the courts

always presume that the legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect." (vide ***J. K. Cotton Spg. And Wvg. Mills Co. Ltd*** **AIR 1961 SC 1170**). This principle has received widespread acceptance by the Supreme Court in numerous decisions. (Vide ***Aswini Kumar Ghose v. Arabinda Bose*** **AIR 1952 SC 369** ; ***Nathi Devi v. Radha Devi Gupta,*** **(2005) 2 SCC 271;** ***Ghanshyamdas v. CST*** **AIR 1964 SC 766).**

46. On an understanding the well-accepted principles of interpretation of statute, I am not for a moment, prepared to hold that the use of the same expressions "payee" and "holder in due course" in both the sections 138 and 142 of the Act and a different expression, "holder" in section 139 of the Act was only an aimless, casual, accidental exercise of the legislature. If the legislature has included, excluded or used a particular expression or expressions (especially which are defined under the Act) in any of the provisions in the statute, it must have been done with definite intentions. It has to be borne in mind that the three provisions (Sections 138, 139 and 142) lie in so close proximity to each other in the same chapter and those were introduced into the same Amendment Act and hence, legislature will not make even an accidental error in choosing the words in these provisions. In my view, it is we-intended.

47. In my understanding of the matter, legislature must have intended that even though a "payee" or "holder in due course" of the cheque can maintain a complaint for offence under section 138 of the Act, if

he has to avail of the benefit of the compulsory presumption under section 139, it must be established that he is the "holder" of the cheque. The court shall not, therefore, mechanically, as a matter of routine, draw the presumption under section 139 of the Act, in favour of the complainant invariably in all cases falling under section 138 of the Act, without further being satisfied from materials on record that the complainant is the "holder" of the cheque. The court shall not presume the "payee" or the "holder in due course" to be the "holder" of the cheque.

HONEST DRAWER TO BE PROTECTED :

48. If the above interpretation is not given to the relevant provisions of the Act, going by the plain language of the relevant provisions, in consonance with the object of the Act and also the intention of the legislature, in my considered opinion, any honest drawer can be harassed by an unscrupulous and dishonest complainant. This is not what is intended. Legislature itself has highlighted in the `Statement of Object and Reasons' of the amendment Act itself that that adequate safeguards are provided in the Amending Act to protect a honest drawer who may draw cheques for various purposes other than the purpose which is relevant under section 138 of the Act. What could be the safeguards in the new chapter?

49. The courts must not be too late to identify such safeguards which the legislature has so preciously provided for a 'HONEST DRAWER', to prevent harassment. In my sustained effort to discover such safeguards, I find that one of such safeguard is available in section 139 itself. By using

the word, `holder' in section 139 of the Act and by the remarkable skill of draftsmanship, legislature has translated its intentions to protect an innocent drawer. By carefully choosing the word "holder" in Section 139 of the Act, legislature has achieved its goal whereby a complainant who seeks the court to draw the presumption under Section 139 of the Act, is bound to establish that he is the "holder" of the cheque, as defined under section 8 of the Act. The courts shall not ignore this legislative wisdom. Rather, it shall try to understand the same.

50. If a contrary interpretation is given to section 139 of the Act, the complainant will be able to realise any amount stated in the cheque through a criminal case by the mere production of the cheque and without even proving his entitlement to receive or recover the amount from the drawer, as referred to in section 8. But, such a recovery without proof of entitlement, is out of question, by way of a civil litigation. A criminal prosecution is not intended to provide for easy short-cuts for recovery of money, without proving even the right to recover the money referred to in the cheque from the drawer. The word "holder" is used in section 139, may be, to avoid such possibility.

51. The provisions of the Act are laid down to punish a dishonest drawer who, after drawing a cheque for the discharge of a debt or liability to another fails to do so, by not keeping sufficient amount in the bank etc., and thereby deliberately defeats the interest of the other. Such a person shall not escape from the clutches of law. This is necessary to enhance

acceptability of cheques in business transactions. If the complainant proves his entitlement as referred to in section 8, the presumption under section 139 can certainly be drawn in his favour so that he is relieved of the burden of proving the one of the important factors to constitute offence under section 138 i.e., the specific purpose for which the cheque is drawn.

52. Taking all these facts into consideration, I find that the legislature has safeguarded a honest drawer while drafting Section 139 by including the expression "holder". The interest of the complainant is also equally protected, by laying down a provision relating to presumption under section 139 on an important factor coming under Section 138 of the Act.

OBJECT WILL BE DEFEATED:

53. But, If a different interpretation is given, it will be harmful to the society. It may even defeat the very object of the Act. Instead of enhancing the acceptability of cheques in settling the liabilities, it will only retard such acceptability. A situation may arise where none would dare to issue any cheque in genuine transactions, fearing misuse of the same by another. A complainant will be able to secure a conviction even without proving his right to possess the cheque and to receive or recover the amount due thereon from the drawer. The possibility of an unwarranted prosecution and even an unmerited conviction would certainly haunt his thoughts and deter him from issuing cheques. The court shall not close its eyes to such probable realities. An interpretation which is likely to defeat the object of the Act has to be avoided.

54. Hence, in my view, the expression "holder" is cautiously used in Section 139 of the Act so that the presumption under the said section shall be drawn in favour of the complainant, only if it is established by evidence and other materials on record that he is the "holder" of the cheque, as defined under Section 8 of the Act. In the absence of establishing the same, no presumption shall be drawn under Section 139, in favour of the complainant, who may ordinarily be the `payee' or `holder in due course', as the case may be. If this is not insisted, there may be chances for misue of the provision which will defeat the very object of the enactment.

APPELLANT NOT `HOLDER':

55. Now, coming to the facts, it is not established in this case that appellant is the "holder" of the cheque. He has not proved his entitlement to receive or recover the amount stated in the cheque, as due thereon from the accused. On an analysis of evidence on record, I find that the case set up by complainant that he advanced a loan of Rs. 60,000/- is not believable. PW1 admitted that he was an unmarried youth who was under the care and protection of his parents, with no source of income of his own, at the time when he allegedly gave the amount to accused. It was also admitted by PW1 that the amount which was allegedly paid to the accused did not personally belong to him. It belonged to his family and they obtained it as sale consideration for pepper and timber. PW1 deposed that he gave the entire money which was available in their box, even without consulting any body at home or taking any security from the accused.

56. The evidence of PW1 also shows that he knew that the accused also had no source of income. It has come out from his admissions that PW1 did not even bother to know what was the accused's job or business or source of income etc., before he gave the money to him. PW1 admitted that he did not know whether the accused had at least any property of his own. PW1 did not know anything about the accused's repayment capacity also. He stated that he did not ascertain any thing about it. It also did not occur to him to ascertain for what purpose he required the amount. In such circumstances, I find it difficult to believe that PW1 would have paid Rs.60,000/- to the accused. The conduct of the complainant, as revealed from evidence does not reconcile with normal human conduct. The uncorroborated evidence of PW1 does not prove his entitlement to receive or recover the amount from the accused.

57. To crown it all, as per the evidence, the accused was suffering from a major mental illness, Schezophrenia (vide evidence of DW3, the doctor and Exts.D1 and D2 are the medical certificates) since about 9 years prior to the alleged transaction. At the time when the amount was allegedly given, accused's mental condition was not quite normal as disclosed from the evidence. He was undergoing treatment, both as an out-patient and as well as an in-patient for a considerable time. He was admittedly in hospital on 20.3.96 and discharged after six days, on 26.3.96. He was again re-admitted in the hospital just six days thereafter on 1.4.96 and then discharged after one week's hospitalisation. He continued

treatment as out-patient thereafter.

58. D.Ws. 1 and 2 also deposed that the accused was having mental illness for the past 8 years and he used to be taken to the hospital by his neighbours and got admitted in the hospital for the mental illness. It has also come out in evidence that one of the cheques issued by the accused in the name of the sister of one of the witnesses was returned to the accused, since the accused had issued the cheque when he was mentally sick. It has come out from the evidence that the neighbours were aware of the peculiar habit and mental illness of the accused and they promptly returned the cheques to the accused, without harming him.

59. DW3, the doctor deposed that when the accused is under the bout of the mental illness, he would be assuming himself to be very rich man or even the Prime Minister and he also may have other fancies which he is really not. It is also stated by the doctor that in such condition, he will not have any reasoning power. There is absolutely no reason to disbelieve or discard the above evidence adduced in this case. The evidence was well tested by cross-examination, but nothing could be brought out to discredit the veracity of medical evidence.

60. The evidence of PW1 itself shows that the alleged borrowal might have taken place either in March 1996 or April 1996. (He gave contradictory statement on this aspect). It can be inferred from the evidence that during this period, the mental condition of the accused was quite bad and he would have exhibited abnormalities and the complainant

also would have noticed the same. It is unbelievable that during such a mental stage, PW1 would have paid Rs.60,000/- to the accused.

61. It is needless to say that any person who advances a loan would necessarily be anxious to get back the amount from the debtor. This is all the more so, since the amount allegedly given to the accused did not belong to PW1, but it was the entire amount which his family possessed. The stability of the mental condition of the debtor would certainly be a factor, which would, in all probabilities dissuade a person from advancing a huge amount. All the above facts cast a serious doubt on the entire prosecution case and it is doubtful whether the accused owed any money at all to PW1. It is not proved that PW1 is entitled to realise the amount in the cheque from the accused.

DEBT NEED NOT BE PROVED ?

62. Learned counsel appearing for the appellant vehemently contended that the complainant need not allege in the complaint that there was a subsisting liability. It is argued that it is for the accused to prove that there is no debt. He advanced this argument by placing reliance upon the dictum laid down by the Supreme Court in the decision reported in ***Srinivas Ramnath Khatod v. State of Maharashtra*** **(A.I.R. 2002 S.C. 182).** It is held therein that the burden is upon the accused to prove that there was no debt or liability and the complainant need not even allege a subsisting liability. This is what is held:

> "There is therefore no requirement that the complainant must specifically allege in the complaint that there was a subsisting liability. The burden of proving that there was no existing debt or liability was on the respondents."

63. On a reading of the above decision, I find that the said dictum was aid down in the context of presumption under section 139 of the Act . In cases where presumption under Section 139 can be drawn, the evidential burden will be on the accused to prove that there was no subsisting debt or liability. The same line of thinking is found in the decision of the Supreme Court in ***Hiten P. Dalal v. Bratindranath Banerjee*** **(JT 2001 (5) 386)** wherein it is held as follows:

> "...The effect of these presumptions is to place the evidential burden on the appellant of proving that the cheque was not received by the Bank towards the discharge of any liability."

64. But, such burden of proof rests on the accused only in cases where presumption under section 139 can be drawn. But, when does such presumption arise? A three-judges bench of the Supreme Court held in clear terms in **Hiten P. Dalal's** case that the presumption can be drawn only in cases in which the factual basis for drawing the presumption exists. The relevant portion from the said decision can be extracted as hereunder:

> "it is obligatory on the court to raise this presumption in every case where the factual basis for the raising of the presumption had been established.....<u>In other words, provided the facts required to form the basis of a presumption of law exist</u>, no discretion is left with the court but to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary"(emphasis supplied).

65. So, it is evident that only if the basis for drawing the presumption under section 139 of the Act exists, the court shall draw the presumption under the said section in which event evidential burden will be on the accused to prove that there is no debt or liability. It is in such cases to which section 139 applies that the Supreme Court held that there was no requirement that the complainant must specifically allege in the complaint that there was a subsisting liability since the burden is on the accused to prove that there is no debt etc.

66. On a joint reading of both the above decisions, I find that irrespective of whether the alleged transaction is stated in the complaint or not, if the complainant seeks to draw the presumption under section 139 of the Act, he is bound to establish the basis for drawing the presumption. The fundamental basis for drawing such presumption is that the court's satisfaction that the person in whose favour the presumption is drawn is the "holder" of the cheque. If such fact is not established, the court shall not draw such presumption in favour of the complainant. The complainant will not then be relieved of the burden of proving one of the ingredients of the offence under Section 138 of the Act.

67. But, the complainant did not establish in this case that as the holder of the cheque, he is entitled, in his own name to receive and recover the amount due thereon from the accused etc. Hence, presumption under section 139 cannot be drawn in his favour to hold that the cheque, though it is admittedly drawn by the accused. The admission of the hand writing and

signature on the cheque alone will not prove the offence under section 138 of the Act, without proving the other ingredients. One of such ingredients is the specific purpose for which the cheque is drawn viz., "for the discharge of a debt or other liability". This is not proved in this case. Hence, there is no ground to interfere with the order of acquittal of the accused.

68. Of course, the acquittal order was passed by the trial court finding that the presumption under section 139 is rebutted. From what I have held in this judgment on the question of law, strictly speaking, such finding cannot be sustained because, this is a case where the presumption under section 139 does not arise, since the complainant failed to establish that he is the "holder" of the cheque. But, that by itself is not sufficient to reverse the order of acquittal and to convict the accused or to remand the case for a further enquiry in the light of the findings arrive at by me.

69. Lastly, learned counsel for appellant in his desperate attempt, reminded me that the accused did not appear and contest this appeal. It was argued that his silence itself will prove the truth in the allegations made in the complaint. With due respect, I can only disagree with the argument. True, nobody appeared for the accused. He did not contest this appeal. He remained absent. But, the silence of an accused alone will not rebut the presumption of his innocence in a criminal prosecution. The prosecution shall prove the guilt of the accused to the hilt. This is not done in this case.

Once again, his silence ? May be, he is under yet another bout of his mental illness. Who knows ?

This appeal fails. Dismissed.

K. HEMA, JUDGE.

Krs.